88-1415

No. .....

Supreme Court, U.S.
FILED
FEB 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

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MICHAEL FACCHIANO, JR., JOHN FACCHIANO, and FACCHIANO CONSTRUCTION COMPANY, INC.,

Petitioners,

v.

UNITED STATES DEPARTMENT OF LABOR, THE SECRETARY OF LABOR, WILLIAM E. BROCK, in his official capacity, and JAMES L. VALIN, in his official capacity,

Respondents.

—o—

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

—o—

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QUESTIONS PRESENTED

1. Whether *res judicata* applies to debarment proceedings instituted by a United States government agency when another government agency has already imposed debarment based upon the same facts and investigation.

2. Whether the court below should have decided the purely legal issue of *res judicata*, rather than remanding the case to the Department of Labor for determination when that agency has already evinced its "special competence" in a manner hostile to Petitioners.

LIST OF PARTIES

The parties to the proceedings below and before this Court are:

1. Michael Facchiano, Jr.
2. John Facchiano.
3. Facchiano Construction Company, Inc.[1]
4. The United States Department of Labor.
5. William E. Brock, in his official capacity.
6. James L. Valin, in his official capacity.

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[1] Pursuant to Supreme Court Rule 28.1, Petitioners state that there are no parent companies or subsidiaries of Facchiano Construction Company, Inc. Petitioner corporation was or is affiliated with Facchiano, Inc. (Petitioner's predecessor), and the following proprietorships: Michael Facchiano, Michael Facchiano Contracting and Michael Facchiano Concrete Construction.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	6
I. THE DOCTRINE OF CLAIM PRECLUSION APPLIES TO A UNITED STATES GOVERNMENT AGENCY WHO INSTITUTES DEBARMENT PROCEEDINGS WHEN ANOTHER GOVERNMENT AGENCY HAS ALREADY IMPOSED SUCH A PENALTY BASED UPON THE SAME FACTS AND INVESTIGATION	7
II. THE COURT BELOW SHOULD HAVE DECIDED THE PURELY LEGAL ISSUE OF WHETHER RES JUDICATA APPLIES BECAUSE THERE ARE NO FACTS TO BE DETERMINED. THE QUESTION INVOLVED IS ONE OF STATUTORY CONSTRUCTION AND THE DEPARTMENT OF LABOR HAS ALREADY EVINCED ITS SPECIAL COMPETENCE IN A MANNER HOSTILE TO FACCHIANO	11
A. The Issue of Res Judicata is Strictly Legal, and Does Not Involve the Department of Labor's Expertise or Fact-Finding Prowess	11
B. The Department of Labor's Hostility and Manifest Opposition to the Facchianos' Res Judicata Argument Militates Against Invocation of Primary Jurisdiction or Exhaustion of Remedies	16
CONCLUSION	18

TABLE OF AUTHORITIES

CASES:

	Page(s)
Amercian Fire and Casualty Company v. Finn, 341 U.S. 6, 71 S.Ct. 534, 91 L.Ed. 702 (1951)	10
Board of Education of the City School District of the City of New York v. Harris, 622 F.2d 599 (2d Cir. 1979)	13, 16
Califano v. Yamasaki, 442 U.S. 682, 99 S.Ct. 2545, 61 L.Ed. 2d 276 (1979)	12
Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940)	7
Clemens v. Central Railroad Company of New Jersey, 399 F.2d 825 (3d Cir. 1968), *cert. den.* 393 U.S. 1023, 89 S.Ct. 6333, 21 L.Ed. 567 (1969)	9
Columbia Gas Transmission v. Allied Chemical Corp., 65 F.2d 503 (5th Cir. 1981)	13
Davis v. United States Steel Company, 688 F.2d 166 (3d Cir. 1982), *cert. den.* 460 U.S. 1014, 103 S.Ct. 1256, 75 L.Ed 2484 (1983)	9
Great Northern Railway Co. v. Merchant's Elevator Co., 259 U.S. 285, 42 S.Ct. 477, 66 L.Ed 943 (1922)	15
McKart v. United States, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969)	14, 15
Mississippi Power & Light Co. v. United Gas Pipe Line Co., 532 F.2d 412 (5th Cir. 1976)	14
Montana v. United States, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979)	7
Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 96 S.Ct. 1978, 48 L.Ed.2d 643 (1976)	13
Porter v. Warner Holding Co., 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332 (1946)	12

TABLE OF AUTHORITIES—Continued

	Page(s)
Purter v. Heckler, 771 F.2d 682 (3d Cir. 1985)	8
Sunshine Anthrocite Coal Company v. Adkins, 310 U.S. 381, 60 S.Ct. 907, 87 L.Ed. 1263 (1940)	8
Tait v. Western Maryland Railroad Co., 298 U.S. 620, 53 S.Ct. 706, 77 L.Ed. 1405 (1933)	8
United States v. Athlone Industries, Inc., 746 F.2d 977 (3d Cir. 1984)	10
United States v. Philadelphia National Bank, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963)	12
United States v. Utah Construction and Mining Company, 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed. 2d 642 (1966)	7
United States v. Western Pacific Railroad Co., 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956)	12, 13
United States v. Willard Tablet Company, 141 F.2d 141 (7th Cir. 1944)	8
West v. Bergland, 611 F.2d 710 (8th Cir. 1979), *cert. den.* 449 U.S. 831 (1980)	15

STATUTES AND MISCELLANEOUS

5 U.S.C. § 551	12
28 U.S.C. § 2101(c)	1
28 U.S.C. § 1254(1)	1
28 U.S.C. § 1331	12
28 U.S.C. § 1361	12
Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C § 327, *et seq.*	2, 4
Davis-Bacon Act, as amended, 40 U.S.C. § 276a, *et seq.*	2, 4

TABLE OF AUTHORITIES—Continued

Page(s)

Department of Housing and Urban Development, *Debarment, Suspension and Ineligibility of Contractors and Grantees; Administrative Sanctions*, 24 C.F.R. § 24.0, *et seq.* 2

Department of Labor, *Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction*, 29 C.F.R. § 5.1, *et seq.* 2

Restatement (Second) of Judgments § 83(1) (1982) 8

Supreme Court Rule 20 1

Supreme Court Rule 28.1 ii

Michael Facchiano, Jr., John Facchiano and Facchiano Construction Company, Inc. respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on October 21, 1988 (Rehearing denied on November 20, 1988).

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Third Circuit (Appendix A, *infra*) is reported at 859 F.2d 1163 and was filed on October 21, 1988. The U.S. Magistrate's Report and Recommendation (Appendix B, *infra*) was entered on December 16, 1987. The Order of the United States District Court for the Western District of Pennsylvania (Appendix C, *infra*) at Civil Action No. 86-2711 was entered on February 16, 1988 and is not reported.

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JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Third Circuit were entered on October 21, 1988. Rehearing was denied by that court on November 20, 1988. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). This Petition is timely filed with the Court under 28 U.S.C. § 2101(c) and Supreme Court Rule 20.

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STATUTES INVOLVED

The relevant statutory and regulatory provisions are:

A. The Davis-Bacon Act, as amended, 40 U.S.C. § 276a, *et seq.*

B. The Contract Work Hours and Safety Standards Act, as amended, 40 U.S.C. § 327, *et seq.*

C. Department of Housing and Urban Development, *Debarment, Suspension and Ineligibility of Contractors and Grantees; Administrative Sanctions*, 24 C.F.R. § 24.0, *et seq.*

D. Department of Labor, *Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction*, 29 C.F.R. § 5.1, *et seq.*

Pertinent portions of the statutory and regulatory provisions are reproduced at Appendix D, *infra*.

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STATEMENT OF THE CASE

This case presents the issue of whether the Government, which has already debarred a contractor in one agency proceeding, can bring a second agency action seeking another, longer period of debarment based upon the same conduct, without violating constitutional due process and principles of fundamental fairness embodied in the doctrine of *res judicata*.

Petitioners, Michael Facchiano, Jr., John Facchiano and Facchiano Construction Company, Inc. appeal from a

decision of the United States Court of Appeals for the Third Circuit, vacating the district court's entry of summary judgment and allowing the Department of Labor to resume debarment proceedings against Petitioners. Petitioners seek reversal of the Court of Appeal's order and the remand of this case with instructions for entry of summary judgment in favor of Petitioners, on the grounds that they are entitled to relief as a matter of law based on the doctrine of *res judicata*.

This action was brought by Michael Facchiano, Jr., and John Facchiano, individually and as Owners of Facchiano Construction Company, Inc., and Facchiano Construction Company, Inc. (hereinafter collectively referred to as "Facchiano") against the United States Department of Labor and William E. Brock and James A. Valin, officials of the Department of Labor (hereinafter collectively referred to as "Department of Labor"). Facchiano sought a permanent injunction or a writ of mandamus prohibiting the Department of Labor from proceeding with a debarment action against Facchiano on the grounds that a previous debarment action by the Department of Housing and Urban Development (HUD) precluded the second action under the doctrine of *res judicata*. The Department of Labor hotly contested Facchiano's action, and the United States District Court for the Western District of Pennsylvania ultimately referred the pending motions to a magistrate. On December 16, 1987, the magistrate filed his Report and Recommendation, recommending that summary judgment be entered in favor of the Department of Labor. Facchiano filed timely objections to the magistrate's Report and Recommendation, to which the Department of Labor responded. By order dated February 16, 1988, the district

court adopted the magistrate's Report and Recommendation as its Opinion, thereby granting the Department of Labor's motion for summary judgment. An appeal followed on March 2, 1988.

Michael Facchiano, Jr., and John Facchiano were officers of Facchiano Construction Company, Inc. The corporation's business included performing projects for local governments and being paid with funds received from HUD. The contracts for such projects required that workers on those projects be paid wages in accordance with the Davis-Bacon Act, 40 U.S.C. § 276a, *et seq.*, and the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 327, *et seq.*

In 1984, the government, through the Department of Labor, determined that Facchiano had not been paying employees in accordance with the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act, and that Facchiano had submitted weekly certified copies of payrolls which falsely reflected compliance with the applicable laws and regulations. The matter was referred to the United States Attorney for the Western District of Pennsylvania, and on January 24, 1985, an information was prepared against Michael Facchiano, Jr. and Facchiano Construction Company. On February 22, 1985, Michael Facchiano, Jr. and Facchiano Construction Company entered a guilty plea on two counts of mail fraud as a result of the mailing of false certifications that the wages required under the Acts had been paid.

On May 15, 1985, the government, through HUD, filed a complaint against Michael Facchiano, Jr. and Facchiano Construction Company, seeking to debar them from par-

ticipation in HUD funded programs for up to three years and suspending them immediately. The HUD action was based on the same information which formed the basis of the prosecution initiated by the United States Attorney. While the administrative proceeding brought by HUD was pending, on December 13, 1985, the government, through the Department of Labor, also initiated debarment proceedings against Facchiano. The action brought by the Department of Labor was grounded on the same investigation which formed the basis of the Complaint previously issued by HUD.

On March 15, 1986, an administrative law judge appointed by HUD issued an order debarring Michael Facchiano, Jr. and Facchiano Construction Company from participation in projects funded by HUD for a period of eighteen (18) months, until November 15, 1986.[2] Neither HUD nor Facchiano sought any further administrative or judicial review of this Order, which became final.

On October 2, 1986, approximately six (6) weeks before the expiration of the period of debarment ordered by the HUD proceeding, the Department of Labor issued its Order of Reference 86-DB, which assigned its complaint to the Office of Administrative Law Judges for commencement of the appropriate hearings.

Facchiano filed suit seeking permanent injunctive relief or mandamus preventing the government from going forward with the Department of Labor's administrative proceeding on the grounds that the doctrines of *res judicata* and collateral estoppel barred the action.

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[2]Credit was given for the period of suspension which began on May 15, 1985.

Following the grant of summary judgment in favor of the government, Facchiano appealed to the United States Court of Appeals for the Third Circuit. On October 21, 1988, a 3-member panel of that court (Judge Rosenn dissenting) vacated the entry of summary judgment but ordered the case to proceed before the Department of Labor. Petitioner's request for rehearing was denied on November 20, 1988.

This Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

Superimposing legal principles upon one's inherent sense of fairness is oft times difficult, but necessary to the preservation of an orderly society. Fortunately, justice is the usual result of meshing legal and equitable precepts. However, misapplication of legal principles can abrogate justice and create undue hardship, especially when the misapplication is coupled with the full punitive force of the federal government.

The United States Court of Appeals for the Third Circuit has misapplied the law in such a way that the full brunt of the government's coercive and punitive powers can now be brought to bear against persons who have already been prosecuted and punished for wrongs committed.

Under the rationale of the Third Circuit, the government, proceeding consecutively through different agencies, may apply identical punishments without allowing access

to the courts until administrative remedies have been exhausted at the agency level. The Third Circuit's Order requiring such exhaustion of administrative remedies is in conflict with the rationale, if not the holding, of numerous cases, both in other Circuits and in this Court. The questions presented for review are of profound significance to Petitioners in this case and to thousands of contractors who perform services for the government. Consideration of this matter is thus essential. Review of the issues presented would resolve these conflicts and promote the proper application of the government's powers, while lessening the unnecessary hardship that can result from the improper exercise of such powers.

I. THE DOCTRINE OF CLAIM PRECLUSION APPLIES TO A UNITED STATES GOVERNMENT AGENCY WHO INSTITUTES DEBARMENT PROCEEDINGS WHEN ANOTHER GOVERNMENT AGENCY HAS ALREADY IMPOSED SUCH A PENALTY BASED UPON THE SAME FACTS AND INVESTIGATION.

The general law pertaining to *res judicata* is well established. The doctrine bars any further claims by the parties or their privies based on the same cause of action where there has been a final judgment on the merits. *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed. 2d 210 (1979). *Res judicata* prevents litigation of all grounds for, or defenses to, recovery that were previously available to the parties, regardless of whether they were asserted or determined in the prior proceeding. *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 60 S.Ct. 317, 84 L.Ed. 329 (1940).

It is also well-settled that the doctrine of *res judicata* is applicable to administrative proceedings. *United States*

v. Utah Construction and Mining Company, 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966). For purposes of claim preclusion, the same parties or their privies are necessary. *E.g., Purter v. Heckler*, 771 F.2d 682 (3d Cir. 1985). Agencies of the same branch of government are in privity with each other, so that a prior decision in one agency proceeding bars a second action brought by a different agency. *Sunshine Anthrocite Coal Company v. Adkins*, 310 U.S. 381, 60 S.Ct. 907, 87 L.Ed. 1263 (1940); *Tait v. Western Maryland Railroad Co.*, 298 U.S. 620, 53 S.Ct. 706, 77 L.Ed. 1405 (1933); *United States v. Willard Tablet Company*, 141 F.2d 141 (7th Cir. 1944).

In this case, there is no dispute that the same parties or their privies are involved, and that there was a final judgment.[3] Indeed, the court below appears to have recognized the *res judicata* effect of a prior administrative determination:

> Nevertheless, "a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of *res judicata*, subject to the same exceptions and qualifications, as a judgment of a court." *Restatement (Second) of Judgments* § 83 (1) (1982). . . . Therefore, an administrative tribunal cannot refuse to observe these preclusion principles when they do apply.
>
> In the case before us, the HUD debarment was sufficiently adjudicatory and final to enable appellants to raise a preclusion defense in the later DOL debarment. Appellants had ample notice, and they had an opportunity to present their case to the HUD ALJ in briefs

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[3]The Department of Labor and the Department of Housing and Urban Development are both members of the Executive Branch of the United States Government.

> and documentary evidence. Moreover, the HUD ALJ filed a detailed opinion containing his factual findings and rulings.

859 F.2d at 1167.

The Department of Labor's only challenge to the application of *res judicata* is an assertion that the issues and relief sought in the HUD proceeding were different from the issues and relief sought in the Department of Labor proceeding. The court below implicitly accepted this assertion when it left the question open:

> [In] this case we have a mixed question of fact in law—whether the HUD cause of action and the DOL cause of action are sufficiently similar to justify claim preclusion.

859 F.2d at 1168, fn 4.[4]

The panel hearing Facchiano's appeal in the court below ignored various prior rulings of the Third Circuit. For example, the Third Circuit has ruled that the fact that different statutes or claims are involved in the actions does not render them different "causes of action" for *res judicata* purposes. *Davis v. United States Steel Company*, 688 F.2d 166 (3d Cir. 1982), *cert. den.* 460 U.S. 1014, 103 S.Ct. 1256, 75 L.Ed. 2484 (1983). Furthermore, the fact that a different theory of recovery is involved or different relief is sought in the two proceedings does not bar application of claim preclusion. *Clemens v. Central Railroad Company of New Jersey*, 399 F.2d 825 (3d Cir. 1968), *cert. den.* 393 U.S. 1023, 89 S.Ct. 6333, 21 L.Ed. 567 (1969). As the court below further explained in *Davis, supra*:

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[4]The lower court's "conclusion" is more specifically addressed, *infra*.

> More difficult is the question of identity of the causes of action. A single cause of action may comprise claims under a number of different statutory and common law grounds. . . . Rather than resting on the specific legal theory invoked, *res judicata* generally is thought to turn on the essential *similarity of the underlying events* giving rise to the various legal claims. . . .

688 F.2d at 171 (citations omitted) (emphasis supplied). *See also American Fire and Casualty Company v. Finn*, 341 U.S. 6, 71 S.Ct. 534, 91 L.Ed. 702 (1951). As the Third Circuit subsequently explained in the *United States v. Athlone Industries, Inc.*, 746 F.2d 977 (3d Cir. 1984):

> Thus, the focal points of our analysis are whether the acts complained of were the same, whether the material facts alleged in each suit were the same and whether the witnesses and documentation required to prove such allegations were the same.

746 F.2d at 984.

In the case before this Court, the proceedings before HUD and the Department of Labor both involve a violation of the same Acts (i.e., the Davis-Bacon Act and the Contract Work Hours and Safety Standards Act). Both actions involved the same conduct (i.e., the failure to pay employees the wages required by the Acts and the failure to file accurate certifications). Both cases involved the same wrong (i.e., the failure to follow the Acts and the problems which occur when allegedly non-responsible contractors do business with the government). Finally, identical evidence is crucial to both actions in that the same contracts, projects, employees and wages are involved.

II. THE COURT BELOW SHOULD HAVE DECIDED THE PURELY LEGAL ISSUE OF WHETHER RES JUDICATA APPLIES BECAUSE THERE ARE NO FACTS TO BE DETERMINED, THE QUESTION INVOLVED IS ONE OF STATUTORY CONSTRUCTION AND THE DEPARTMENT OF LABOR HAS ALREADY EVINCED ITS SPECIAL COMPETENCE IN A MANNER HOSTILE TO FACCHIANO.

A. The Issue of Res Judicata is Strictly Legal, and Does Not Involve the Department of Labor's Expertise or Fact-Finding Prowess.

While the court below noted that the "HUD debarment was sufficiently adjudicatory and final to enable appellants to raise a preclusion defense . . .", 859 F.2d at 1167, it failed to directly address the issue, and instead left the determination to the Department of Labor, who would be required to "at least consider apellants' preclusion defense". *Id.* In so doing, the court refused to deviate, despite a persuasive dissent, from its position that the "exhaustion of administrative remedies" doctrine must be applied to the present case.

While both the majority and dissenting opinions in the court below speak in terms of "exhaustion of administrative remedies," the discussion more properly should focus on the closely-related doctrine of "primary jurisdiction".[5]

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[5]"Exhaustion of administrative remedies" applies where a claim is cognizable in the first instance by an administrative agency alone. "Primary jurisdiction", on the other hand, applies where a claim is originally cognizable in the courts, and comes

(Continued on following page)

Under the doctrine of primary jurisdiction, as a general rule, a court should refer a matter to an administrative agency for resolution, even if the matter is otherwise properly before the court, if it appears that the matter involves technical or policy considerations which are beyond the court's ordinary competence and within the agency's particular field of expertise. *E.g., United States v. Philadelphia National Bank*, 374 U.S. 321, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963). Primary agency jurisdiction, like "exhaustion of administrative remedies," is a flexible concept, concerned with "promoting proper relationships be-

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into play whenever enforcement of the claim requires the resolution of issues which have been placed in the special competence of an administrative body. *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126 (1956). There is little question that the courts have jurisdiction over this matter. The action arose under Section 702 of the Administrative Procedures Act, 5 U.S.C. § 551, *et seq.*, which entitles a person adversely affected or aggrieved by an agency action to judicial review thereof. In addition, jurisdiction over the action was conferred upon the district court by 28 U.S.C. § 1331, which grants original jurisdiction over all civil actions arising under the Constitution, laws, or treaties of the United States. Third, jurisdiction was proper under 28 U.S.C. § 1361, which grants original jurisdiction in the nature of mandamus to compel an officer of an agency of the United States to perform a duty. Finally, to the extent Facchiano sought an injunction from the district court, this Court noted, in *Califano v. Yamasaki*, 442 U.S. 682, 99 S.Ct. 2545, 61 L.Ed.2d 276 (1979):

> Absent the clearest command to the contrary from Congress, federal courts retain their equitable power to issue injunctions in suits over which they have jurisdiction.

442 U.S. at 705, 99 S.Ct. at 2559, 61 L.Ed.2d at 195. *See also Porter v. Warner Holding Co.*, 328 U.S. 395, 398, 66 S.Ct. 1086, 1089, 90 L.Ed 1332, 1336 (1946). The Department of Labor has never contested jurisdiction and, in fact, has argued the case on the merits before the district court and the Third Circuit.

tween the courts and administrative agencies charged with particular regulatory duties." *Nader v. Allegheny Air-Lines, Inc.*, 426 U.S. 290, 303, 96 S.Ct. 1978, 1986, 48 L.Ed.2d 643, 654 (1976), *quoting United States v. Western Pacific R. Co., supra.*

As with any judicially-created concept, there are judicially-created exceptions to the application of "primary jurisdiction."[6] There is no need to apply the doctrine of primary agency jurisdiction when the issue involved is a "strictly legal one" involving neither the agency's particular expertise nor its fact-finding abilities. *Board of Education of the City School District of the City of New York v. Harris*, 622 F.2d 599, 607 (2d Cir. 1979). As the Fifth Circuit noted in *Columbia Gas Transmission v. Allied Chemical Corp.*, 65 F.2d 503 (5th Cir. 1981):

> No fixed formula exists for applying the doctrine of primary jurisdiction. In every case, the question is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in a particular litigation. (citation omitted) . . . . It is well estabished that the courts need not refer an issue to an agency when the issue is strictly a legal one, involving neither the agency's particular expertise or its fact-finding prowess; the standards to be applied in resolving the issue are within the conventional competence of the court and the judgment of a technically expert body is not likely to be helpful in the application of the standards to the facts of the case (citations omitted). Furthermore, the

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[6]The exceptions to the doctrine of "primary jurisdiction" are closely related to the exceptions to "exhaustion of administrative remedies". The rationale for the exceptions would be the same under either doctrine.

> 'Courts should be reluctant to invoke the doctrine of primary jurisdiction, which often, but not always, results in added expense and delay to the litigants when the nature of the action deems the application of the doctrine inappropriate . . . Likewise, when the agency's position is sufficiently clear or non-technical, or when the issue is peripheral to the main litigation, courts should be very reluctant to refer. . . . Finally, the court must always balance the benefits of seeking the agency's aid with the need to resolve disputes fairly, yet as expeditiously as possible.'

652 F.2d at 519-20, fn. 15, quoting *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412, 419 (5th Cir. 1976).

This Court, in *McKart v. United States*, 395 U.S. 185, 89 S.Ct. 1657, 23 L.Ed.2d 194 (1969), has recognized that the proper interpretation of a statute is "certainly not a matter of discretion." 395 U.S. at 198, 89 S.Ct. at 1665, 23 L.Ed.2d at 206. When the resolution of the issue does not require any particular expertise on the part of an administrative body, and when judicial review "would not be significantly aided by an additional administrative decision," there need not be a reversion to an administrative tribunal. 399 U.S. at 199, 89 S.Ct. at 1665, 23 L.Ed.2d at 206.

The Court should balance the goals of the "exhaustion of remedies" and "primary jurisdiction" doctrines against the interests of the parties:

> Except in those cases where exhaustion of administrative remedies is specifically required by statute administrative remedies need not be pursued if the litigant's interests in immediate review outweigh the government's interests in the efficency or adminis-

trative autonomy that the exhaustion doctrine is designed to further.

West v. Bergland, 611 F.2d 710, 715 (8th Cir. 1979), *cert. den.* 449 U.S. 831 (1980). *See also McKart v. United States, supra.* ("We must ask, then, whether there is in this case a governmental interest compelling enough to outweigh the severe burden placed on petitioner". 395 U.S. at 197, 89 S.Ct. at 1664-65, 23 L.Ed.2d at 205).

The court below determined that the issue of claim preclusion was not "strictly legal, as the term has been applied in the exhaustion cases." 859 F.2d at 1168. However, the court ignored its own prior rulings, rulings from other Circuits, and rulings of this Court in that it failed to demonstrate how the *res judicata* issue depends on anything other than a legal interpretation of labor statutes and regulations. The majority did not point to any question of fact, and indeed, as indicated *supra*, there is no question of fact. It has already been determined that Petitioners are guilty of mail fraud charges which arose out of the determination by the Department of Labor that they have falsified records to conceal violations of the Davis Bacon Act and the Contract Work Hours and Safety Standards Act. The case involves nothing more than statutory interpretation. *See Great Northern Railway Co. v. Merchant's Elevator Co.*, 259 U.S. 295, 42 S.Ct. 477, 66 L.Ed. 943 (1922) (Where the question is one of construction, a court can pass on it as an issue purely of law). Nor does the court below show that there is a governmental interest compelling enough to outweigh the burden placed on Petitioners, who will be forced to suffer a delay of judicial resolution of an issue that has already been argued by the parties and addressed by the courts, as well as the added expense to be incurred in re-

arguing their *res judicata* position in the courts following an unfavorable determination by the Department of Labor.

B. The Department of Labor's Hostility and Manifest Opposition to the Facchianos' Res Judicata Argument Militates Against Invocation of Primary Jurisdiction or Exhaustion of Remedies.

In addition to the foregoing, the doctrine of primary jurisdiction should not be applied when "resort to the agency would plainly be unavailing in light of its manifest opposition or because it has already evinced its 'special competence' in a manner hostile to Petitioner . . . ." *Board of Education of the City School District of the City of New York v. Harris, supra,* 662 F.2d at 607.

In conflict with the Second Circuit's decision in *Harris,* the court below failed to address the "hostility" exception to the primary jurisdiction doctrine. The facts of the present case clearly indicate such hostility. As succinctly stated in the lower court's dissenting opinion:

> Although the DOL has the power to sustain Appellants' preclusion claim, it is very unlikely that further proceedings before it would produce such a result. Inasmuch as the successful prosecution of the Appellants by HUD for the underlying charges and HUD's debarment proceedings were predicated upon the DOL's own investigation, it is unlikely, in the very nature of human behavior, that the DOL will be fully objective and impartial. When the agency has already evinced its special competence in a manner hostile to appellants, 'courts need not bow to the primary jurisdiction of the administrative body."

859 F.2d at 1171. Likewise, in *Harris, supra,* the Second Circuit concluded that the administrative agency in that

case had "evinced its special competence in a manner hostile to petitioner" because it "fully briefed and hotly contested the [disputed] issue on appeal." 622 F.2d at 607.

Prior debarment proceedings in this case were predicated upon the Department of Labor's investigation of Petitioners. The Department of Labor is a Respondent to this Petition. The Department of Labor "fully briefed and hotly contested" the issue of claim preclusion in its lower court brief, and argued the issue before that court. Therefore, it appears unlikely that Facchiano can receive an objective determination on the question of *res judicata* if required to present that question to the Department of Labor for determination.

Finally, a United States magistrate and the district court judge have already addressed the issue of *res judicata* by delving into the merits of this case. The purposes that the doctrine of primary jurisdiction and/or exhaustion of remedies serves will not be aided by its application to Facchiano. Nor does the added cost and delay visited upon Petitioners by invocation of those doctrines serve the ends of justice.

———o———

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted to permit a resolution of important issues affecting Petitioners, contractors and other persons aggrieved by multiple proceedings commenced by the government for the same offense.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-3143

MICHAEL FACCHIANO, JR., JOHN FACCHIANO, and FACCHIANO CONSTRUCTION COMPANY, INC.,

Appellants

v.

THE UNITED STATES DEPARTMENT OF LABOR, THE SECRETARY OF LABOR, WILLIAM E. BROCK, in his official capacity and JAMES L. VALIN, in his official capacity,

Appellees

On Appeal From the United States District Court for the Western District of Pennsylvania

(D.C. Civil No. 86-2711)

Argued July 19, 1988

Before: HIGGINBOTHAM, BECKER and ROSENN, *Circuit Judges*

[Filed October 21, 1988]

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

Following an administrative proceeding, appellants, Facchiano Construction Company, Inc. ("Facchiano Construction") and one of its principals, Michael Facchiano, Jr., were debarred in 1986 by the Department of Housing and Urban Development ("HUD"), from participating for a period of 18 months in HUD-sponsored contracts. This debarment was based upon the conviction of Michael Facchiano and Facchiano Construction on mail fraud charges which arose out of the determination of the Department of Labor ("DOL") that they had falsified records to conceal violations of the Davis-Bacon Act, 40 U.S.C. § 276a (1982), and the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 327-332 (1982) in connection with work on HUD-sponsored contracts.

DOL thereupon sought to debar appellants, Facchiano Construction, and its officers, Michael Facchiano, Jr., and John Facchiano,[1] from *all* government contracts for a

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1. DOL also sought to debar Michael Facchiano, Sr., who is not a party to this suit.

period of three years on the grounds of the underlying Davis-Bacon violations. Appellants responded with a suit in the district court for the Western District of Pennsylvania seeking to enjoin the administrative proceeding on the grounds that it was precluded by the previous debarment. The district court granted summary judgment for DOL. This appeal presents the question whether a suit for injunctive relief will lie in the district court under these circumstances, or whether appellants must instead, pursuant to the exhaustion of administrative remedies doctrine, present the preclusion defense in the administrative proceedings.

Although a court can enjoin administrative proceedings when an agency undertakes vexatious litigation, the district court found that not to be the case here, and its finding is supported. However, the district court failed to consider the well-established principle that administrative tribunals are fully capable of considering preclusion defenses, and it contravened the related exhaustion doctrine by reaching the merits and determining that the HUD debarment in fact had no preclusive effect on the DOL debarment proceeding. Therefore, while we will affirm the grant of summary judgment against appellants insofar as it denied injunctive relief, we will vacate the opinion of the district court insofar as it adjudicates the merits of the preclusion issue. The agency will be able therefore to resume its proceedings and address the issue itself.

I.

After Facchiano Construction had performed a number of construction projects sponsored by HUD's Community Development Block Grant program, DOL conducted an investigation which revealed that it had been falsely

certifying the wages paid to the employees who were working on the HUD-sponsored projects. The investigation, completed in 1984, disclosed that the wages and overtime pay were below those required by the Davis-Bacon Act, 40 U.S.C. § 276a (1982), and the Contract Work Hours and Safety Standards Act, 40 U.S.C. §§ 327-332 (1982). Because of false wage certifications sent through the mails, Michael Facchiano, Jr. and Facchiano Construction were indicted for mail fraud in February 1985, they waived indictment and pleaded guilty. The district court required them to make restitution of $126,000 to the employees and fined Michael Facchiano and the Facchiano Construction $2,000 each. Michael Facchiano also received a prison sentence of six months followed by five years probation.

In May 1985, following the mail fraud conviction, HUD initiated an administrative action to debar Michael Facchiano, Jr. and Facchiano Construction from HUD-sponsored contracts pursuant to 24 C.F.R. § 24.6(a)(1), (4), and (9) (1985). Under these regulations, HUD can debar contractors who have been convicted of crimes committed in the pursuit, the attempt to pursue, or the performance of public or private contracts, where the conviction(s) have put the contractors' integrity in doubt or where the conduct involved is deemed "serious" by the Assistant Secretary of HUD. On May 15, 1985, HUD notified Michael Facchiano and Facchiano Construction of its proposed debarment and requested submission of briefs and supporting material in accordance with 24 C.F.R. § 24.7(a) (1985).[2]

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2. Although appellants requested an oral hearing, they were not entitled to a hearing under 24 C.F.R. § 24.5(c) (1985). App. at 33a. The HUD administrative law judge therefore based his determinations on the documentary evidence and written briefs submitted by the parties.

In a final order dated March 5, 1986, the HUD administrative law judge ordered an 18-month debarment from contracts awarded by HUD. This order was not appealed.

In December 1985, DOL notified appellants that it was initiating its own debarment proceeding under 29 C.F.R. § 5.12(b)(1) (1985). This regulation enables DOL to debar contractors for willfully violating the Davis-Bacon Act and other regulatory labor standards. DOL sought to debar appellants from all government contracts for three years. Rather than avail themselves of the opportunity to contest this second debarment in the administrative forum, appellants immediately sued in the District Court for the Western District of Pennsylvania, seeking a permanent injunction or a writ of mandamus to prevent DOL's administrative proceedings. The district court issued a preliminary injunction staying the administrative proceedings pending the outcome of the suit. Both parties moved for summary judgment, and the district judge assigned the case to a magistrate for a report and recommendation.

In their summary judgment memorandum, appellants contended that the DOL's proposed debarment was founded on the same cause of action as the HUD debarment, and hence was barred by principles of claim preclusion. Acknowledging that the HUD debarment was based upon a conviction, and the DOL proceeding upon the underlying facts the concealment of which led to the conviction, appellants submitted that the distinction was without a difference and that the claims were essentially the same. In appellants' view DOL and HUD were privies, as agencies in the executive branch, hence, DOL's claim should have

been raised in the prior debarment proceeding since otherwise the same government could repeatedly punish a contractor for the same conduct.[3] DOL, however, rejoined that the HUD disbarment had no claim preclusive effect on the DOL debarment proceeding precisely because the mail fraud conviction and the underlying regulatory violations represented different causes of action.

The magistrate began by noting that exhaustion is not required when, by not observing the principles of preclusion, " 'the challenged agency action presents a clear and unambiguous violation of statutory or constitutional rights.' " App. at 147 (quoting *Susquehanna Valley Alliance v. Three Mile Island*, 619 F.2d 231, 245 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981). He found, however, that this case did not fall within this exception to the exhaustion doctrine. Then addressing the preclusion issue, he determined that the HUD and the DOL debarments were different in two respects: (1) the HUD debarment was limited to HUD contracts whereas the DOL debarment would be government wide; and (2) the HUD debarment was based on appellants' criminal conviction whereas the DOL debarment would be based on the conduct underlying the mail fraud, *i.e.*, the violations of the Davis-Bacon Act. The magistrate believed that, because of these differences, the two separate agency actions arose from different causes of action and subsumed different issues, and that neither issue preclusion nor claim preclusion should apply.

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3. Although appellants also relied upon *issue* preclusion, that doctrine would not appear apposite. Moreover, it would appear to be of doubtful utility to appellants since all the issues in the HUD debarment were decided against appellants.

The magistrate therefore recommended that injunctive relief be summarily denied on the grounds that no preclusive effect exists and that, as a consequence, appellants failed to meet the requirements for the exception to the exhaustion doctrine. Adopting the magistrate's recommendation and findings, the district court granted DOL's motion for summary judgment. This appeal followed.

II.

The doctrine of exhaustion of remedies requires that parties first use all prescribed administrative measures for resolving a conflict before they seek judicial remedies. *See Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-52 (1938). This doctrine serves judicial economy by preventing piecemeal judicial review of agency actions and facilitates judicial review by allowing the administrative tribunal to use its expertise to develop a complete factual record. *See Cerro Metal Products v. Marshall*, 620 F.2d 964, 970 (3d Cir. 1980). Further, the doctrine serves to prevent the courts from frustrating congressional decisions to have certain disputes resolved originally in administrative forums. *See Babcock & Wilcox Co. v. Marshall*, 610 F.2d 1128, 1136 n.21 (3d Cir. 1979).

The doctrine of claim preclusion is important in the administrative as well as the judicial context, because of the "obvious principle that a controversy should be resolved once, not more than once." K. Davis, 4 *Administrative Law Treatise* § 219 (2d Ed. 1983). In general,

> [w]here an administrative forum has the essential procedural characteristics of a court . . . its determinations should be accorded the same finality that is accorded the judgment of a court. The importance of

> bringing a legal controversy to conclusion is generally no less when the tribunal is an administrative tribunal than when it is a court. Hence, the rule of claim preclusion is properly applied to administrative adjudications of legal claims.

Restatement (Second) of Judgment § 83 comment b (1982). Thus, there are compelling reasons for allowing the doctrine of claim preclusion to operate in administrative determinations.

We note, however, that preclusion does not apply in all administrative law cases. In *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966), the Supreme Court held that preclusion principles apply to administrative proceedings [only] when the administrative agency in the first action was "acting in a judicial capacity" and the parties had an adequate opportunity to present their case. *See also Bowen v. United States*, 570 F.2d 1311, 1320-21 (7th Cir. 1978). Moreover, we have noted that administrative preclusion "must be tempered by fairness and equity" and is not as rigidly enforced as preclusion in judicial proceedings. *Purter v. Heckler*, 771 F.2d 682, 691 (3d Cir. 1985). Nevertheless "a valid and final adjudicative determination by an administrative tribunal has the same effects under the rules of res judicata, subject to the same exceptions and qualifications, as a judgment of a court." *Restatement (Second) of Judgments* § 83(1) (1982); *see also* K. Davis, *supra*, § 21:2 (detailing the development of administrative preclusion). Therefore, an administrative tribunal cannot refuse to observe these preclusion principles when they do apply.

In the case before us, the HUD debarment was sufficiently adjudicatory and final to enable appellants to raise

a preclusion defense in the later DOL debarment. Appellants had ample notice, and they had an opportunity to present their case to the HUD ALJ in briefs and documentary evidence. Moreover, the HUD ALJ filed a detailed opinion containing his factual findings and rulings. *In re Michael Facchiano, Jr. and Facchiano Construction Co., Inc.*, HUDBCA No. 85-962-D33 (March 5, 1986). Appellants do not argue that consideration of preclusion in the administrative tribunal would lead to inequities or unfairness, and we perceive none. We thus conclude that, unless the doctrine is somehow waived, the DOL ALJ must at least consider appellants' preclusion defense, and concomitantly that the doctrine of exhaustion prevents the district court from deciding the preclusion defense in the first instance.

III.

As with many legal doctrines, the doctrine of exhaustion is not absolute. The doctrine exists within a court's discretion rather than as a strict rule of law. *See Cerro Metal Products*, 620 F.2d at 970 ("Except when required by statute, exhaustion of administrative remedies is not an inexorable command, but is a matter of sound judicial discretion"); K. Davis, *supra*, § 26:1, at 414-417. This court has developed three broad exceptions to the doctrine:

> We have declined to require exhaustion [1] when the challenged agency action presents a clear and unambiguous violation of statutory or constitutional rights, [2] when resort to administrative procedures is "clearly shown to be inadequate to prevent irreparable injury," or [3] when exhaustion is "futile."

Susquehanna Valley Alliance v. Three Mile Island, 619 F.2d 231, 245 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096

(1981) (citations omitted).[4] We address the exceptions now, except that since there is no claim of futility, we need not address that exception.

The requirement of exhaustion may be waived under the first exception in *Susquehanna* when an agency's malicious prosecution and disregard for the principles of preclusion amount to a violation of a party's due process. Appellants claim that this case falls within the due process exception to the exhaustion doctrine. They contend that they should not be required to litigate the DOL debarment

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4. The dissent argues that exhaustion may not be required when the "issue involved is a strictly legal one, involving neither the agency's particular expertise nor its fact finding processes." *Board of Education v. Harris*, 622 F.2d 599, 607 (2d Cir. 1979), *cert. denied*, 449 U.S. 1124 (1981). The case law indicates that this Court recognizes a legal question exception to the exhaustion doctrine, however, this exception is inapposite to this case, because the issue to be decided is not "strictly legal" as that term has been applied in the exhaustion cases. Two cases in this Circuit elaborate on what is meant by the legal question exception to the exhaustion doctrine. In *Bethlehem Steel Corp. v. EPA*, 669 F.2d 903 (3d Cir. 1982), we stated that exhaustion might not be required "where a dispute centers on legal questions such as constitutional or statutory interpretation." *Bethlehem Steel*, 669 F.2d at 907. *See also Flying Tiger Line v. Teamsters Pension Trust Fund*, 830 F.2d 1241, 1253 (3d Cir. 1987) (stating that "the requirements of the exhaustion doctrine are . . . not applicable" when the issue is one of statutory interpretation). In contrast, in this case we have a mixed question of fact and law—whether the HUD cause of action and the DOL cause of action are sufficiently similar to justify claim preclusion.

Furthermore, the body most conversant with the matter of what constitutes a debarment cause of action for DOL is DOL. Therefore, we also decline to apply this exception to this case, because DOL is more expert on this issue. *See Bethlehem Steel*, 669 F.2d at 907 ("[I]t is more desirable to let the administrative process go forward without interruption than to permit the parties to petition the courts at various intermediate stages. In that way, the agency can . . . apply any special expertise it might possess . . . .").

in an administrative forum because the HUD debarment proceeding so clearly precludes other debarments by executive agencies.

The applicable principle is summarized by Professor Moore:

> [A] claim asserted in a subsequent proceeding is barred by the res judicata effect of a prior judgment is not itself grounds for an injunction against the claimant. Vexatious, damaging or harassing potentialities of the proceeding to be enjoined must be established to authorize relief. Bad faith, if any, of the party seeking relitigation, difficulties imposed by a subsequent suit or suits on the party seeking an injunction, in the expense of time, money and energy required to defend, and the effect of continued litigation on his business or reputation, are considered by courts when asked to enjoin relitigation of matters previously adjudged.

1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* ¶ 0.408[2] (1988) (footnotes omitted). In *Continental Can Co. v. Marshall*, 603 F.2d 590 (7th Cir. 1979), for example, the Court of Appeals enjoined the Occupational Safety and Health Review Commission ("OSHRC") from citing the Continental Can Company for noise level violations. In 1973, an administrative law judge had vacated eight OSHRC citations against Continental Can because OSHRC's interpretation of the statutory noise reduction standards was invalid. Despite this ruling OSHRC proceeded to litigate citations issued to sixteen other Continental Can plants under the same (invalid) interpretation. Since all of Continental Can's eighty plants used the same machinery as the cited plants, the court found that Continental Can faced the possibility of relitigating

"the issue 'over and over in an untold number of hearings.'" *Id.* at 596 (quoting the district court). The repetitious litigation in this case, therefore, amounted to "'harassment of a capricious kind'" and violated Continental Can's due process rights. *Id.* Since requiring Continental Can to face the administrative tribunal would only exacerbate this unconstitutional injury, the court deemed exhaustion waived.[5]

The circumstances in *Continental Can* are distinguishable from those before us for three reasons. First, Continental Can faced the possibility of relitigating the same issue an "untold" number of times because the OSHRC ALJ refused to apply preclusion to the relitigated issue. In the case at bar, there is no indication that either HUD or DOL (or any other government agency) would pursue any debarment actions other than those already taken. Moreover, DOL's ALJ in the case at bar did not have a chance to address appellants preclusion defense before they sought injunctive relief. Second, although we intimate no view on the underlying issue, it is undoubted that this case, on its face, does not present the elements of preclusion in an aggravated form as did *Continental Can.* This case involves two different agencies pursuing two debarments differing in length and scope under two different sets of regulations. *Continental Can,* on the other hand, involved the same agency trying repeatedly to re-

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5. In *Babcock & Wilcox Co. v. Marshall,* 610 F.2d 1128, 1138 (3d Cir. 1979) (citing *Continental Can,* 603 F.2d at 596), this court recognized in dicta that exhaustion can be waived when, *inter alia,* an agency's vexatious and harassing refusal to follow issue preclusion, as in *Continental Can,* constitutes a clear and unambiguous violation of constitutional rights.

litigate what was undoubtedly the same issue against the same company. Third, unlike the Continental Can Company, appellants lost their earlier administrative proceedings; therefore, DOL was not harassing a previously vindicated party. *See International Harvester Co. v. Occupational Safety and Health Review Commission,* 628 F.2d 982, 986 n.4 (7th Cir. 1980) (distinguishing *Continental Can* and finding no harassment because OSHA had not repeatedly cited Harvester for conduct that was previously found lawful).

In addition to the foregoing DOL's action does not rise to the level of vexatiousness because we cannot see, nor do appellants show us, how they will be harmed by litigating in the administrative forum. Appellants give no indication that the administrative action would impose intolerable litigation costs. *Cf. United States v. American Honda Motor Co.*, 273 F. Supp. 810, 819 (N.D.Ill. 1967) (finding repetitious litigation vexatious because it involved subpoenas calling for more than 6,000 pages of documents from all over the country).

Appellants have failed to show that the DOL debarment proceeding will amount to a clear and unambiguous violation of their statutory or constitutional rights. We find no evidence that the administrative litigation would be any more costly than the litigation before us; in fact, we think it more likely that the administrative litigation could have been more efficient and economical than appellants' pursuit of an injunction. Indeed, even if the administrative tribunal rejects the preclusion defense, it still might feel no need to impose any additional penalties on the appellant. In sum, this case does not fall within the excep-

tion to the exhaustion doctrine carved out by *Continental Can* and *Babcock* because, even if appellants have a valid claim preclusion defense, DOL's action does not amount to vexatious prosecution.

IV.

The short of it is that, rather than seeking to enjoin the DOL debarment through collateral judicial action, appellants must first try to litigate their case before an administrative officer. By seeking to enjoin the administrative proceedings, appellants have closed off an efficient administrative forum in which to resolve a number of issues. Absent any indication of a due process violation or vexatious prosecution, we find no reason to frustrate the policies underlying the doctrine of exhaustion by circumventing the doctrine. We will therefore affirm the judgment of the district court insofar as it denied injunctive relief. However, because the opinion of the district court adjudicates the merits of the preclusion issue, we will vacate it so that the agency may resume its own proceedings and address the issue.

ROSENN, *Circuit Judge, dissenting.*

The majority concludes that "[a]bsent any indication of due process violation or vexatious prosecution," (Maj. Op. at 14), it finds no reason to frustrate the policies underlying the doctrine of exhaustion by enjoining the Department of Labor (DOL) debarment proceedings. I believe that the exceptions to the doctrine requiring exhaustion of administrative remedies are not nearly as limited as the majority paints them, but have a much broader and more flexible range. Absent a statutory mandate for ex-

haustion of administrative remedies, there is no judicial justification to relegate a party to administrative procedures when the issue involved is only a legal one, requiring neither the agency's expertise nor any factual determinations. Because that is precisely the situation in this case, I respectfully dissent.

I.

The basic premises underlying the exhaustion of administrative remedies doctrine are that (1) judicial review may be facilitated by permitting the appropriate agency to proceed without interruption to develop a factual record and apply its expertise with respect to technical subject matter, (2) administrative autonomy requires that an agency be afforded an opportunity to proceed without interference from the courts when the decision involves the exercise of discretionary powers granted by the Congress or the agency's expertise; and (3) judicial resources may be conserved should the agency grant the relief sought. *McKart v. United States*, 395 U.S. 185, 194-95 (1969).

However, the doctrine, like most judicial doctrines, is subject to numerous exceptions. *McKart*, 395 U.S. at 193. As the majority correctly observes, the exhaustion doctrine is not absolute and "exists within a court's discretion rather than as a strict rule of law." (Maj. Op. at 10). Therefore, the court should balance the goals of the doctrine against the interests of the parties.

> Except in those cases where exhaustion of administrative remedies is specifically required by statute, . . . administrative remedies need not be pursued if the litigant's interests in immediate review outweigh the

> government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further.

West v. Bergland, 611 F.2d 710, 715 (8th Cir. 1979), *cert. denied*, 449 U.S. 831 (1980). The exceptional circumstances presented by this case demand exercise of the court's discretion.

The only issue here is whether the HUD debarment had a preclusive effect on the later DOL debarment proceeding.[1] This is merely a legal question involving two government agencies, the resolution of which requires no administrative findings or expertise on the part of the DOL. The facts have been stipulated and are neither technical nor complex. Nor does resolution of the legal issue depend on the interpretation or application of the agency's own regulations. "It is well established that the courts need not defer to any agency where the issue involved is a strictly legal one, involving neither the agency's particular expertise nor its fact finding processes." *Board of Educ. v. Harris*, 622 F.2d 599, 607 (2d Cir. 1979), *cert. denied*, 449 U.S. 1124 (1981). *Accord Borden, Inc. v. FTC*, 495 F.2d 785, 787 (7th Cir. 1974); *Consumers Union of United States v. Cost of Living Council*, 491 F.2d 1396, 1399 (T.E.C.A.), *cert. denied*, 416 U.S. 984 (1974). Because the failure of the appellants to submit their preclusion claim to the administrative processes of the agency only

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1. I agree with the majority that "the HUD debarment was sufficiently adjudicatory and final to enable appellants to raise a preclusion defense in the later DOL debarment . . . . Moreover, the HUD ALJ filed a detailed opinion containing his factual findings and rulings." Maj. op. at 9.

deprive the DOL of the opportunity to decide a pure legal issue, and does not deprive it of the opportunity to speak on matters within its realm of expertise, this case should be treated as an exception to the doctrine of exhaustion.

Moreover, resort to administrative remedies will probably only delay judicial resolution of this same issue, thereby frustrating the equally valid goals of judicial economy and expediency as well as imposing unnecessary additional expense and time on the parties. The United States District Court has already ruled on the issue and it has been briefed and orally argued on appeal. Although the DOL has the power to sustain appellants' preclusion claim, it is very unlikely that further proceedings before it would produce such a result. Inasmuch as the successful prosecution of the appellants by HUD for the underlying charges and HUD's debarment proceeding were predicated upon the DOL's own investigation, it is unlikely, in the very nature of human behavior, that the DOL will be wholly objective and impartial. When the agency has already evinced its special competence in a manner hostile to the appellants, "courts need not bow to the primary jurisdiction of the administrative body." *Board of Educ. v. Harris,* 622 F.2d at 607.

Finally, in view of the history of the previous proceedings, I believe that compelling the appellants to respond to yet another administrative proceeding, before allowing judicial determination of the legal issue, serves no purpose and is unduly harsh. The Court has recognized that, under certain circumstances, application of the exhaustion

doctrine may be unacceptably harsh. In *McKart,* the petitioner had been convicted for failure to submit to induction into the Armed Forces of the United States. The district court held that the petitioner was barred from raising the defense of military exemption because he had failed to exhaust the administrative remedies provided by the Selective Service System. In holding that the failure to exhaust his administrative remedies did not bar McKart from challenging the validity of his classification as a defense to the criminal prosecution, the Court observed that "use of the exhaustion doctrine in criminal cases can be exceedingly harsh." *McKart*, 395 U.S. at 197.

In the circumstances of this case, although civil, compelling appellants to submit to an additional agency proceeding only for a decision on a legal issue would also be harsh. The DOL completed its final investigation in 1984 but failed to initiate any debarment proceedings. Following their conviction on the basis of the DOL investigation, the individual defendants were sentenced to prison, fined, and ordered to make restitution. Appellants made restitution in the sum of $126,000 to their employees. They were then subjected to administrative proceedings by HUD and debarred. Less than three months before the HUD ALJ entered his debarment order. DOL at last decided to commence its own debarment proceeding. It now seeks to deprive appellants of a judicial inquiry. As in *McKart*, we too must ask then, "whether there is in this case a governmental interest compelling enough to outweigh the severe burden paced on [appellants]." *Id.* at 197. I see none.

Accordingly, I would decide the legal issue of claim preclusion raised on this appeal and not require exhaustion of remedies before the DOL. I therefore dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSLYVANIA

MICHAEL FACCHIANO, JR., et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 86-2711
THE UNITED STATES DEPARTMENT OF LABOR, et al.,	)	
Defendants.	)	

MAGISTRATE'S REPORT AND
RECOMMENDATION

I. *Recommendation*

It is respectfully recommended that the defendants' motion for summary judgment be granted.

II. *Report*

Presently before the Court for disposition is the defendants' motion to dismiss for lack of jurisdiction and cross motions for summary judgment.

The facts are basically uncontested and are set forth in the parties joint stipulation filed on June 30 1987. Facchiano Construction Company ("the Company") is a corporation engaged in the operation of a concrete constructing business. Michael Facchiano and John Facchiano are officers of the company. During the period

between 1982 and 1984, the company was engaged in construction projects which were partially funded by the Department of Housing and Urban Development ("HUD"). During the summer of 1984 the Department of Labor ("Labor") conducted an investigation, and determined that the company had been paying its employees less than the prevailing wages applicable under the Davis-Bacon Act, 40 U.S.C. § 267a, *et seq.*; that the company had not properly paid the amount of overtime compensation required under the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 327 *et seq.* and that the company had falsified its payroll records to reflect compliance with those Acts. Thereafter, a criminal information was filed in this Court and on February 22, 1985, Michael Facchiano, Jr. and the company pled guilty to two counts of mail fraud. Michael Facchiano, Jr. was sentenced to six months incarceration on February 22, 1985 and fines were levied against both him and the Company. In addition, back wages were paid to company employees.

Subsequently, HUD filed an administrative complaint against Michael Facchiano and the Company seeking to debar them from participating in HUD funded programs and by Order dated March 15, 1986, it was directed that they be debarred from participating in any HUD funded project until November 15, 1986. Since no party appealed from that decision, it became final on April 5, 1986.

In the interim, Labor also commenced a debarment proceeding, and the plaintiffs notified Labor of the ongoing HUD proceeding. On October 2, 1986, Labor issued its Order of Reference of the matter to another Administrative Law Judge. However, by Order of this Court

dated June 2, 1987, further administrative action was enjoined pending further proceedings.

The instant suit was commenced pursuant to Section 702 of the Administrative Protection Act, 5 U.S.C. § 551, *et seq.*, as well as 28 U.S.C. § 1331 and 1361, on December 22, 1986 by the plaintiffs seeking to enjoin Labor from preceeding with the debarment proceedings; issuance of a writ of mandamus directing Labor to terminate the debarment proceedings, and such other relief as may be deemed appropriate. The defendants have now moved to dismiss this action and the parties have also submitted cross motion for summary judgment.

Motion to Dismiss

In its motion to dismiss the defendants allege that this Court lacks subject matter jurisdiction in that the plaintiffs have failed to exhaust the available administrative remedies. This allegation is not appropriate at the motion to dismiss stage.

The defendants contend that since the plaintiffs have not exhausted their administrative remedies they are not entitled to judicial relief. *McKart v. United States*, 395 U.S. 185, 193 (1969). The general rule was stated by the Supreme Court in *Myers v. Bethlehem Corp.*, 303 U.S. 41, 50-52 (1983) wherein it was observed:

> the long settled rules of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted . . . the rule requiring exhaustion of the administrative remedy cannot be circumvented by asserting that the charge on which the complaint rests is groundless and that the mere

> holding of the prescribed administrative hearing would result in irreparable damage. Lawsuits also often prove to have been groundless; but no way has been discovered of relieving a defendant from the necessity of a trial to establish the fact.

However, while the requirement of exhaustion of administrative remedies is the general rule, it is a judicially created rule and does not affect a court's subject matter jurisdiction. Accordingly, the Third Circuit has recognized three situation in which the requirement of exhaustion may be waived. *Susquehanna Valley Alliance v. Three Mile Island*, 619 F.2d 231 (sic) 3d Cir. 1980).

The first situation is "when the challenged agency action presents a clear and unambiguous violation of statutory or constitutional rights . . ." *Susquehanna*, 619 F.2d at 245. *See also, First Jersey Securities, Inc. v. Bergen*, 605 F.2d 690, 697 (3d Cir. 1979). The exhaustion requirement may also be waived when following administrative guidelines is "clearly shown to be inadequate to prevent irreparable injury," *Babcock and Wilcox Co. v. Marshall*, 610 F.2d 1128, 1138 (3d Cir. 1979), quoting *American Fed'n. of Gov't. Employees v. Resor*, 442 F.2d 993, 994-95 (3d Cir. 1971). Lastly exhaustion may be waived if resorting to it would be futile. *Susquehanna*, 619 F.2d at 245.

In order to determine whether the plaintiffs' complaint fits within one of these exceptions, a court must make "a careful analysis of the statutory scheme relied on by the plaintiff, of the completeness or incompleteness of remedies available from the agency, [and] of the presence or absence of harm pendente lite." *Susquehanna*,

619 F.2d at 246. However, the Third Circuit has held that a Rule 12(b) motion to dismiss is not the appropriate means for securing such an analysis. *Id.*

Motion for Summary Judgment

The defendants contend that the plaintiffs' present action should be barred by the judge-made doctrine of exhaustion of administrative remedies. We have earlier discussed the three generally held waivers to this doctrine. Two of the three waivers clearly do not apply. First, irreparable injury is not an inevitable outcome of following administrative guidelines. The injuries envisioned by the plaintiffs, litigation expenses and loss of business are the normal cost of litigation. Such cost has been held not to be 'irreparable injury', *Myers,* supra at 51. Second, resorting to administrative remedies would not be futile, as the plaintiff could raise any defenses, including that of res judicata and collateral estoppel in an administrative hearing and on appeal. Further, it appears that the plaintiffs would not become ineligible to work on Department of Labor projects until after a final agency decision.

A third waiver could apply here, "when the challenged agency action presents a clear and unambiguous violation of statutory or constitutional rights . . ." *Susquehanna,* 619 F.2d at 245. When the procedure itself is alleged to be violative of a constitutional right, exhaustion has not been required. *Babcock and Wilcox Co. v. Marshall,* 610 F.2d 1128, 1138 (3d Cir. 1979). For example when the administrative procedure would subject "a party to 'vexatious and harassing' prosecution by refusing to apply collateral estoppel." *Babcock v. Wilcox,* 610 F.2d

at 1138, citing *Continental Can Co., U.S.A. v. Marshall,* 603 F.2d 590, 596 (7th Cir. 1979).

Whether the plaintiff's res judicata and collateral estoppel arguments are valid depends on whether DOL was bound by the prior HUD action. The plaintiffs contend that the HUD debarment was based upon Section 7(1)(3) of Policy Letter No. 82-1 issued by the Office of Federal Procurement Policy. This letter was subsequently incorporated within 48 C.F.R. 9.4 et seq. Debarments of contractors under this section are "effective throughout the executive branch of the Government . . ." 48 C.F.R. 9.406-1(c).

Neither the plaintiff nor the defendant have provided case law to support their reading of agency debarment policy. However, from the language of the regulation it appears that 48 C.F.R. 9.4 *et seq.* refers to federal procurement contracts. A contractor is defined by that requlation as an individual or entity which:

> (a) submits offers for, is awarded, or reasonably may be expected to submit offers for or be awarded a Government contract or a subcontract under a Government contract or
>
> (b) conducts business with the Government as an agent or representative of another contractor.

48 C.F.R. 9.403.

So that all agencies will be aware of the debarment of procurement contractors, the General Services Administration (GSA) is required to "[c]ompile and maintain a current consolidated list of all contractors debarred, suspended, or declared ineligible by agencies or by the

General Accounting Office . . .'' 48 C.F.R. 9.404(1)(1). Facchiano Construction Company was not placed on such a list. U.S. G.S.A. Consolidated List of Debarred, Suspended and Ineligible Contractors, October 1986.

While 48 C.F.R. 9.4 may facially appear to be across the board in application, the language of 9.406-1 limits it applicability to debarments ''for any of the causes in 9.406-2, using the procedures in 9.406-3.'' 48 C.F.R. 9.406-1. The regulation defines debarment for its purposes as an ''action taken by a debarring official under 9.406 . . .'' 48 C.F.R. 9.403. The regulation does not state that ''any'' debarment by an agency has government-wide effect, merely that those actions taken under 9.406 have such affect.

The record here demonstrates that Facciano (sic) Corporation was debarred from participating in federal assistance programs under HUD. Federal assistance programs appear not to be covered under 48 C.F.R. 9.4 *et seq.* ''This subpart does not apply to recipients of Federal assistance.'' 48 C.F.R. 9.401. Subsequent to the HUD proceeding, in February 1986, the President signed an Executive Order authorizing the issuance of guidelines which would provide that a debarment from an agency's federal assistance program would work to bar the violator from any other federal agency's assistance program. The Office of Management and Budget (OMB) set forth on May 29, 1987, ''Guidelines for Nonprocurement Debarment and Suspension.'' 52 Fed. Reg. 20360, No. 103, Doc. 84-12317. These guidelines are ''similar to that currently in effect for procurement'' contracts. *Id.* It is clear that nonprocurement contracts which include ''both

direct assistance [e.g., grants, cooperative agreements, scholarships, and fellowships] as well as indirect benefits [e.g., insurance and loan guarantees]", *Id.*, were not covered by the guidelines of 48 C.F.R. 9.4 *et seq.*

The plaintiffs were debarred under a HUD proceeding which limited the debarment to HUD funded projects. The applicable HUD regulation defines "debarment" in pertinent part as "exclusive from a participation in HUD programs . . ." 24 CFR 24.4(a) Further, the HUD proceeding was based on the narrow fact situation of Facchiano Construction Co. and Michael Facchiano Jr's. criminal convictions for mail fraud. The DOL proceeding is based on the issue of the plaintiffs' violations of the Davis-Bacon Act, 29 C.F.R. 5.1 *et seq.* If the Secretary of Labor finds a violation of Davis-Bacon the subsequent debarment not only suspends the offending contractor from contracts with the DOL, but also with all other government agencies. 29 C.F.R. 5.12(a)(2) states:

> In cases arising under contracts covered by the Davis-Bacon Act, the Administrator shall transmit to the Comptroller General the names of the contractors . . . who have been found to have disregarded their obligations to employees, and the recommendation of the Secretary of Labor or authorized representative regarding debarment. The Comptroller General will distribute a list to all Federal agencies giving the names of such ineligible person or firms, who shall be ineligible to be awarded any contract or subcontract of the United States . . .

It appears from this reading of the regulations that there is an insufficient relationship between the debarment proceeding brought by HUD, and the proceeding by

DOL which the plaintiffs seek to enjoin. The only similarities shown are that Facchiano Construction Company was the defendant, an agency of the federal government was involved, and that Facchianos' violations of the Davis-Bacon Act underlay the Agency actions. However, important differences remain. The HUD action only, and could have only, debarred Facchiano from HUD contracts, while the DOL action would have government-wide effect. Further, the HUD action was based on a criminal conviction, the result of Davis-Bacon violations; the DOL action is based on the Davis-Bacon violations themselves. For the foregoing reasons, the plaintiff's claim for injunctive relief should be denied.

Summary judgment is appropriate where there no (sic) material factual issues in dispute, and the movant is entitled to judgment as a matter of law. *Disabled in Action v. Sykes*, F.2d (3d Cir. No. 87-1021, filed November 23, 1987.) Because there are no material factual issues in dispute, and because it appears as a matter of law that judgment in favor of the defendants is appropriate, it is respectfully recommended that the defendants' motion for summary judgment be granted.

Respectfully submitted,

/s/ Robert C. Mitchell
ROBERT C. MITCHELL
United States Magistrate

Dated: December 16, 1987

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

MICHAEL FACCHIANO, JR., et al.,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 86-2711
THE UNITED STATES DEPARTMENT OF LABOR, et al.,	)	
Defendants.	)	

ORDER

AND NOW, this 16th day of Dec., 1987, the Magistrate's Report and Recommendation having been filed,

IT IS ORDERED that the plaintiff shall have ten (10) days in which to file objections to said Report and Recommendation. Failure to file timely objections may constitute a waiver of any appellate rights.

/s/ ROBERT C. MITCHELL
ROBERT C. MITCHELL
United States Magistrate

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APPENDIX D

CONTRACT WORK HOURS AND SAFETY STANDARDS ACT, 40 U.S.C. § 327, *et seq.*

* * *

§ 328. Forty hour week; overtime compensation; contractural conditions; liability of employers for violations; withholding funds to satisfy liabilities of employers

(a) Notwithstanding any other provision of law, the wages of every laborer and mechanic employed by any contractor or subcontractor in his performance of work on any contract of the character specified in section 329 of this title shall be computed on the basis of a standard workweek of forty hours, and work in excess of such standard workweek shall be permitted subject to provisions of this section. For each workweek in which any such laborer or mechanic is so employed such wages shall include compensation, at a rate not less than one and one-half times the basic rate of pay, for all hours worked in excess of forty hours in the workweek.

* * *

§ 329. Contracts subject to this subchapter; workers covered; exceptions

(a) The provisions of this subchapter shall apply, except as other wise provided, to any contract which may require or involve the employment of laborers or mechanics upon a public work of the United States, of any territory, or of the District of Columbia, and to any other contract which may require or involve the employment of laborers or mechanics if such contract is one (1) to which the United States or any agency or instrumentality thereof, any territory, or the District of Columbia is a party, or (2) which is made for or on behalf of the United States,

any agency or instrumentality thereof, any territory, or the District of Columbia, or (3) which is a contract for work financed in whole or in part by loans or grants from, or loans insured or guaranteed by, the United States or any agency or instrumentality thereof under any statute of the United States providing

* * *

DAVIS-BACON ACT, 40 U.S.C. § 276a, *et seq.*

* * *

§ 276a-1. Termination of work on failure to pay agreed wages; completion of work by Government

* * *

Every contract within the scope of sections 276a to 276a-5 of this title shall contain the further provision that in the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and to prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

§ 276a-2. Payment of wages by Comptroller General from withheld payments; listing contractors violating contracts

(a) The Comptroller General of the United States is authorized and directed to pay directly to laborers and mechanics from any accrued payments withheld under the terms of the contract any wages found to be due laborers

and mechanics pursuant to sections 276a to 276a-5 of this title; and the Comptroller General of the United States is further authorized and is directed to distribute a list to all departments of the Government giving the names of persons or firms whom he has found to have disregarded their obligations to employees and subcontractors. No contract shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have an interest until three years have elapsed from the date of publication of the list containing the names of such persons or firms.

* * *

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, DEBARMENT, SUSPENSION AND INELIGIBILITY OF CONTRACTORS AND GRANTEES; ADMINISTRATIVE SANCTIONS, 24 C.F.R. § 24.0, *et seq.*

* * *

§ 24.5 General.

(a) *Officials who may initiate debarment.* Any Debarring Official may initiate debarments. No debarment may be initiated against HUD-FHA approved mortgagees, however, without approval of the Mortgagee Review Board. A Debarring Official, acting in the public interest, may debar a participant or contractor for any cause set forth in § 24.6. In each case, even if the offense or violation is of a criminal, fraudulent or other serious nature, the decision to initiate debarment shall be within the discretion of the Debarring Official and in the best interests of the Government.

* * *

Debarment may be imposed in accordance with the provisions of §§ 24.5 and 24.7 for:

(a) *Conviction.* Conviction of, or civil judgment for, any offense indicating lack of business integrity or honesty which affects the present responsibility of a contractor or participant, including but not limited to:

(1) Fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public or private agreement;

(2) Bribery, embezzlement, false claims, false statements, falsification or destruction of records, forgery, obstruction of justice, receiving stolen property, or theft; or

(3) Unlawful price fixing between competitors, allocation of customers between competitors, bid rigging, or any other violation of Federal or State antitrust laws that relates to the submission of bids or proposals.

* * *

(c) *Other Causes.* Any of the following causes:

(1) Debarment or equivalent exclusionary action by any public agency or instrumentality for causes substantially the same as provided for in § 24.6;

* * *

(3) Conduct indicating a lack of business integrity or honesty which affects the present responsibility of a contractor or participant;

(4) Loss or denial of the right to do business or practice a profession under circumstances indicating a lack of business integrity or honesty or otherwise affecting the present responsibility of a contractor or participant;

* * *

(12) Making or causing to be made any false statement for the purpose of influencing in any way an action of the Government; or

(13) Any other cause determined by a Debarring Official to be of so serious or compelling a nature that it affects the present responsibility of a contractor or participant.

* * *

§ 24.8 Effect of debarrment.

(a) *Contractors.* In addition to exclusion from direct or indirect participation in HUD programs, a contractor's debarment from procurement shall be effective throughout the Executive Branch of the Government, in accordance with 48 CFR 9.406-1(c), unless a contracting agency's head, or designee, states in writing the compelling reasons justifying continued business dealings between that agency and the contractor.

(b) *Participants. A* participant's debarment is limited to direct or indirect participation in HUD programs. Such participation includes receipt of any direct or indirect benefit or financial assistance through grant or contractual arrangements; direct or indirect benefit or assistance in the form of loan guarantees or insurance; and award of procurement contracts, notwithstanding any quid pro quo given or whether the Department gives anything in return.

* * *

§ 24.11 Scope of debarment.

(a) *Scope in general.* (1) Debarment of a person or affiliate under this part constitutes debarment of all its subsidiaries, divisions, and other organizational elements unless the debarment decision is limited by its terms to one or more specifically identified individuals or organizational elements or to specific types of agreements.

* * *

(2) *Conduct imputed to individuals associated with participant.* The fradulent, criminal, or other seriously improper conduct of a contractor or participant may be imputed to any officer, director, shareholder having a 10 percent or greater interest, partner, employee, or other individual associated in a business context with the contractor or participant who participated in, knew of, or had reason to know of the contractor's or participant's conduct.

* * *

§ 24.31 The consolidated list of debarred, suspended, or ineligible contractors.

(a) The Inspector General shall compile and transmit to the General Services Administration (GSA) a list of all contractors debarred, suspended, or declared ineligible by the Department.

* * *

§ 24.34 Effect of sanctions.

(a) *Consolidated list—(1) Debarred or suspended contractor.* Debarred or suspended contractors who are included on the Consolidated List are excluded from receiving contracts, and HUD shall not solicit offers from, award contracts to, or consent to subcontracts with, these contractors, unless the Secretary or designee determines in writing that there is a compelling reason for such action.

* * *

DEPARTMENT OF LABOR, LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION, 29 C.F.R. § 5.1, *et seq.*

* * *

§ 5.5 Contract provisions and related matters.

* * *

(3) *Payrolls and basic records.*

(ii)(A) The contractor shall submit weekly for each week in which any contract work is performed a copy of all payrolls to the (write in name of appropriate Federal agency) if the agency is a party to the contract, but if the agency is not such a party, the contractor will submit the payrolls to the applicant, sponsor, or owner, as the case may be, for transmission to the (write in name of agency). The payrolls submitted shall set out accurately and completely all of the information required to be maintained under § 5.5(a)(3)(i) of Regulations, 29 CFR Part 5. This information may be submitted in any form desired.

* * *

(B) Each payroll submited shall be accompanied by a "Statement of Compliance," signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:

(1) That the payroll for the payroll period contains the information required to be maintained under § 5.5(a)-(3)(i) of Regulations, 29 CFR Part 5 and that such information is correct and complete;

(2) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly

wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in Regulations, 29 CFR Part 3;

(3) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.

(C) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph (a)(3)(ii)(B) of this section.

(D) The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under section 1001 of Title 18 and section 231 of Title 31 of the United States Code.

* * *

§ 5.12 Debarment proceedings.

(a)(1) Whenever any contractor or subcontractor is found by the Secretary of Labor to be in aggravated or willful violation of the labor standards provisions of any of the applicable statutes listed in § 5.1 other than the Davis-Bacon Act, such contractor or subcontractor or any firm, corporation, partnership, or association in which such contractor or subcontractor has a substantial interest shall be ineligible for a period not to exceed 3 years (from the date of publication by the Comptroller General of the

name or names of said contractor or subcontractor on the ineligible list as provided below) to receive any contracts or subcontracts subject to any of the statutes listed in § 5.1.

(2) In cases arising under contracts covered by the Davis-Bacon Act, the Administrator shall transmit to the Comptroller General the names of the contractors or subcontractors and their responsible officers, if any (and any firms in which the contractors or subcontractors are known to have an interest), who have been found to have disregarded their obligations to employees, and the recommendation of the Secretary of Labor or authorized representative regarding debarment. The Comptroller General will distribute a list to all Federal agencies giving the names of such ineligible persons or firms, who shall be ineligible to be awarded any contract or subcontract of the United States or the District of Columbia and any contract or subcontract subject to the labor standards provisions of the statutes listed in § 5.1.

* * *